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**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

Issued by the Department of Transportation
on the 14th day of July, 2000

Application of

MIDWEST EXPRESS AIRLINES, INC.

Docket OST-00-7189- 7

For an exemption from 14 CFR Part 93, under
49 U.S.C. §41714

ORDER GRANTING EXEMPTION

SUMMARY

By this order the Department is granting the application of Midwest Express Airlines, Inc., for an exemption to permit it to reassign one slot at Ronald Reagan Washington National Airport (Reagan National or DCA) to an alternative time.

APPLICATION

On April 5, 2000, Midwest Express filed an application for an exemption to slide one existing 2100 hour (9:00 p.m.) Reagan National slot to the 0700 hour (7:00 a.m.) in order to permit it to offer daily nonstop Kansas City-Washington (DCA) service with Stage 3 MD-80 aircraft.

In support of its application, the carrier states that it complies with all of the conditions specified in 49 U.S.C. §41714(d), which authorizes the Department to grant exemptions to air carriers operating or holding slots at Reagan National if such conditions are met. Midwest Express asserts that its request meets the exceptional circumstances test required by statute and defined by Department guidelines and precedent, in that it will enable new nonstop service, with specially configured Stage 3 MD-80 aircraft,¹ in a currently underserved market. The carrier states that, while the market is quite large (185,000 annual O & D passengers), the current nonstop service is limited to only 3 weekday round-trip flights, with no service on Saturday and only a single flight on Sunday. The carrier further states that with the new nonstop service, the market will grow with the added capacity and the stimulative effect of competitive

¹ Midwest Express operates Boeing MD-80 aircraft with leather seating in a "2 plus 2" configuration with one-third fewer seats than other MD-80 aircraft.

service. Further, the carrier states that, with the earlier slot, it will be able to operate its service beyond Kansas City to San Francisco, thereby providing single plane, one-stop service on a coast-to-coast routing that would be very competitive with nonstop service currently concentrated at Washington's Dulles Airport.

RESPONSIVE PLEADINGS

On April 18, the Air Carrier Association of America (ACAA) filed an answer opposing the application. ACAA requests that the Department deny the request of Midwest Express and, in addition, withdraw all 2100 hour slots that have been "temporarily" allocated under Part 93, subpart S and use established lottery procedures to reallocate those slots to new entrants.

ACAA states that granting Midwest Express's request to slide a commuter slot would continue the Department's preferential treatment of the carrier and would continue to block any other new entrant from entering Reagan National Airport. ACAA argues that the Department must seek to distribute DCA benefits more evenly between all small incumbents, including Midwest Express, and new entrants. In doing so, ACAA believes that the Department would be acting consistently with previous statements and policy to promote new entry and facilitate a competitive environment at all airports (especially at Reagan National, where new entrants have been blocked from operating for fifteen years).

On April 19 the City of Kansas City, Missouri, filed an answer. The City states that it strongly supports the application of Midwest Express, and that the grant of this application will permit the carrier to better serve Kansas City and Washington. The City further states that the service that Midwest Express provides to Kansas City is absolutely essential to the economic well being of the community and allows the community to compete with other communities for economic opportunities.

According to the City of Kansas City, the grant of the carrier's application will permit Midwest Express to offer one daily nonstop round trip in the Kansas City-DCA market, and two new one-stop single round trips a day in the market as well. This will increase the current single plane capacity in the market by 78 percent. The carrier will also use the same aircraft to commence new daily nonstop service between Kansas City and San Francisco, and the City of Kansas City states that this market is the largest O & D market for Kansas City for which nonstop service is not offered.

On April 20, Vanguard Airlines, Inc., filed an answer. Vanguard states that it opposes Midwest Express's request to move an existing 2100 hour slot to the 0700 hour, to the extent that it would impair Vanguard's application for four slot exemptions filed in Docket OST-2000-7182, in particular, the carrier's request for an 0700 DCA departure slot exemption. Vanguard states that Midwest Express' application does not itself increase the number of operations at DCA between 0700 and 2159 by more than two operations per hour. However, Vanguard has applied for an 0700 departure slot

exemption in Docket OST-2000-7159² itself and to the extent that the Midwest Express request for an 0700 slot, in conjunction with other requests for slot exemptions at DCA, would trigger the two-operations-per-hour limitation, then such request could adversely affect Vanguard's ability to obtain its requested 0700 slot exemption.

Vanguard further states that its request for a 0700 slot exemption should be given a higher priority than the request of Midwest Express. First, Midwest Express has not shown any "extraordinary circumstances" as a condition to obtaining the slot slide approval in preference to Vanguard; second, Vanguard would be a new entrant at DCA, while Midwest Express operates a substantial pattern of nonstop service at DCA to Omaha and Milwaukee; third, Vanguard is the only applicant that operates a hub at Kansas City, and its request for a 0700 DCA departure is critical to enable it to operate a DCA-Kansas City westbound flight to meet its 0900 connecting bank at Kansas City; and fourth, Vanguard's proposal would provide important public benefits through the provision of low fares.

On April 28, Midwest Express filed a reply to the answer of ACAA. It states that ACAA's response must be rejected as a matter of policy; and that Midwest Express is precisely the kind of small air carrier that Congress intended when passing 49 U.S.C. § 41714(d). Midwest Express states that ACAA is wrong when it implies that the slot that it desires to "slide" is a temporary slot subject to recall by the FAA. In fact, the carrier states, it is both the holder and operator of the slot that previously been acquired and is not subject to recall. Further, Midwest Express states that ACAA is wrong to suggest that Midwest Express has been the recipient of preferential treatment from the Department. Rather, the Department, in Order 99-11-4, indicated that any carrier, new entrant, limited incumbent or incumbent carrier, could have employed the same technique used by Midwest Express to retime DCA slots. Finally, Midwest Express states that ACAA is also wrong when it implies that the grant to Midwest Express of its request to move one slot will further entrench dominant carriers at DCA. The carrier states that granting Midwest Express the authority to retime a single slot to the 0700 hour will fulfill the goal set for the Department by the Congress in enacting 49 U.S.C. § 41714(d) to enhance competition at DCA by facilitating only those carriers that hold a limited number of slots.

Finally, on May 1, Midwest Express filed a reply to the answer of Vanguard Airlines. The carrier states that the grant of its application under § 41714(d) does not reduce the number of additional hourly slots that can be awarded in the 0700 hour under § 41718. Thus, Vanguard's assertion that the grant of Midwest's request to slide one slot to the 0700 hour would preclude its request in a separate pleading to acquire its own 0700 slots, is not supported by the text of the law nor the intent of the Congress.

² Now Consolidated in Docket OST-2000-7182.

DECISION

We have decided to grant Midwest Express's application.

Under 49 U.S.C. § 41714(d) the Department may, under circumstances that it finds to be exceptional, grant exemptions to an air carrier that holds or operates slots at Reagan National to enable it to slide the operating times of slots to different periods. Such exemptions are very limited and must meet explicit conditions. Under present practice the Department must find that grant of the authority would not (1) result in an increase in the total number of slots per day at Reagan National; (2) result in an increase in the total number of slots at Reagan National from 7:00 a.m. to 9:59 p.m.; (3) increase the number of operations at Reagan National in any one-hour period by more than two operations; (4) result in the withdrawal or reduction of slots operated by an air carrier; or (5) result in a net increase in noise impact on surrounding communities resulting from changes in timing of the exempted operations.

Midwest Express's proposed slide would not result in a net increase in the total number of operations at Reagan National during any day. Rather, it will result in a decrease of one operation in the 9:00 p.m. period and an increase of one operation in the 7:00 a.m. period. No other carrier's slot holdings will be affected. And, because Midwest Express will be merely changing the timing of one operation, there will be no net increase in noise impact on the communities surrounding the airport.

Thus, the proposal meets all of the statutory requirements described above, including the requirement that grant of the application would not result in an increase of more than two slots in any given scheduled hour, either individually or cumulatively, at Reagan National.

We noted in Order 94-9-49, and more recently affirmed in Order 99-11-4,³ that our authority to grant exemptions for slot slides at Reagan National is applicable only in limited circumstances to meet the specific needs of carriers holding a limited number of slots at that airport. Midwest Express currently holds or operates sixteen Reagan National slots and has demonstrated a need for nonstop Washington-Kansas City service that it will implement through the slot slide authorized here. The exemption will enable Midwest Express to operate nonstop service between Reagan National and Kansas City and thus meet the increasing demand in that market. The applicability of our slot exemption authority is appropriate under the exceptional circumstances Midwest Express has presented.

We do not agree with ACAA's assertion that other carriers would be precluded from acquiring slots, nor do we agree that the slots should be recalled by the FAA and

³ On November 22, 1999, ACAA filed a petition for reconsideration of Order 99-11-4. By Order 2000-2-26 we affirmed our findings in that order.

distributed through a lottery. We have addressed these arguments previously in Order 99-11-4 where we found that a DCA lottery would not be practical at this time.⁴

With regard to the issue set forth by Vanguard Airlines, on July 5 the Department issued Order 2000-7-2 granting 12 slot exemptions for within-perimeter service at Reagan National under a separate statute contained in the Wendell H. Ford Aviation Investment Reform Act for the 21st Century (AIR-21). Since that case is now concluded, and Vanguard is no longer an applicant for slot exemptions at Reagan National, its opposition to the request of Midwest Express to slide a slot to an alternative time, to the extent that such a slide would jeopardize Vanguard's application for slot exemptions, is moot.

ADMINISTRATIVE TERMS

As the FAA slot regulation makes clear "slot(s) do not represent a property right but represent an operating privilege subject to absolute FAA control (and) slots may be withdrawn at any time to fulfill the Department's operating needs..."

14 CFR 93.223(a). We also stipulate that operation of the Reagan National slot at 0700 authorized by this order must be used only to provide nonstop service between Kansas City and Reagan National. Midwest Express may not sell, trade, transfer, or convey the operating authority granted by this exemption.

The Department is authorizing the movement of one slot operation by this order on the grounds that the service proposed by the applicant meets the statutory public interest and exceptional circumstances criteria. The Department reserves the right to modify or terminate such authority if the Department determines that, due to changed circumstances, these criteria are no longer satisfied by an applicant's use of the authority.

This Order is issued under authority delegated in 49 CFR 1.56a(f)(1).

ACCORDINGLY,

1. The Department grants an exemption from 14 CFR Part 93, subparts K and S to Midwest Express Airline, Inc., to the extent that Midwest Express will be allowed to move the operation of Slot No. 1588, at Ronald Reagan Washington National Airport from the 2100 hour to the 0700-0759 period;

2. This exemption is granted only to the extent that Midwest Express is allowed to move the operation of Slot No. 1588 for the purpose of providing nonstop service between Kansas City, Missouri, and Ronald Reagan Washington National Airport. Should Midwest Express operate this slot to provide service to a point other than

⁴ In addition, the slot at issue here is not one that was temporarily allocated by the FAA, but rather is a permanent slot held by Midwest Express.

Kansas City, this exemption will expire and the operation of this slot will revert back to the 2100 hour;

3. This exemption is granted only to the extent that Midwest Express is allowed to move the operation of Slot No. 1588, and therefore, Midwest Express continues to be subject to all of the other requirements delineated in 14 CFR Part 93, Subparts K and S including, but not limited to, the reporting provisions and use or lose requirements;

4. We direct Midwest Express to contact the Federal Aviation Administration's Slot Administration Office to determine the startup date for the exemption granted here. The Federal Aviation Administration will assign a slot number for the slot exemption listed in ordering paragraph 1; and

5. This exemption will become effective on October 1, 2000.

By:

A. BRADLEY MIMS
Acting Assistant Secretary for Aviation
and International Affairs

(SEAL)

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